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Matthew J. Parlow

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THE NBA AND THE GREAT RECESSION: IMPLICATIONS FOR THE UPCOMING COLLECTIVE BARGAINING AGREEMENT RENEGOTIATION

*Matthew J. Parlow**

I. INTRODUCTION

Like most businesses, the National Basketball Association (NBA) has suffered significant negative impacts from the Great Recession. The league's drop in revenue exposed distinct flaws in the NBA's current business model and in the terms of employment for NBA players. Due to the precarious economic state of the NBA, the league anticipates a contentious, but necessary, renegotiation of the NBA's collective bargaining agreement (CBA), which will expire at the end of the 2010-11 season. This article will analyze the effects of the Great Recession on the NBA and the likely implications for the renegotiation of the CBA. Part II of this article will provide a macro-level overview of the economic impacts experienced by the NBA during the current economic meltdown. Part III will explore the attendant effects on NBA players. Part IV will then give an overview of the collective bargaining process—including its significance in sports, antitrust, and labor and employment law—and explore the employment terms that will likely become the focus of the upcoming CBA renegotiation. Finally, Part V will provide some concluding insights.

II. ECONOMIC IMPACTS OF THE GREAT RECESSION ON THE NBA AND ITS TEAMS

The Great Recession has clearly affected the financial stability of the NBA.¹ NBA Commissioner David Stern recently projected that

* Associate Professor of Law, Marquette University Law School; J.D., Yale Law School; B.A., Loyola Marymount University. I would like to thank T.J. Clifton and the other editors of the DePaul Journal of Sports Law and Contemporary Problems for inviting me to speak at their symposium entitled "Sports and the Great Recession," as well for their research and editing assistance; Alex Porteshawver for her research assistance; and Marquette University Law School for its financial support.

1. The etymology of the term "Great Recession" is an interesting one. See Catherine Rampell, "Great Recession": A Brief Etymology, N.Y. Times, Mar. 11, 2009, available at <http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/>. However, for pur-

the NBA would lose approximately \$400 million for the 2009-10 season.² This figure doubles the amount of money—\$200 million—that the NBA has lost in each of the past four seasons.³ The National Basketball Players Association (NBPA)—the union that represents professional basketball players in the NBA—originally expressed doubts about the veracity of this loss projection.⁴ However, NBPA President Derek Fisher later backtracked on this position by acknowledging that the NBA might lose this amount of money, but questioned whether it was fair to place the blame on what some perceived to be excessive player salaries.⁵ Fisher suggested that the current bad economic conditions and the circumstances or actions of some teams—including having outdated arenas or hurting attendance by “dumping” players in order to create salary cap room for the next season—may be causing the revenue loss, not necessarily player salaries.⁶ As will be discussed further below, the solutions to such revenue loss will likely constitute some of the more contentious terms in the renegotiation of the NBA CBA. The various manifestations of the economic downturn provide an important context for understanding the flaws in the NBA’s current structure and what may be required to bring financial stability to the league.

A. Drop in Revenue and Salary Cap Implications

Nearly half of NBA teams posted losses for the 2008-09 season.⁷ This included the NBA Eastern Conference Champion Orlando Magic, which lost between \$15 million and \$20 million for the 2008-09

poses of this article, the term “Great Recession” will be used to refer to the economic downturn that befell the United States economy—and the world economy more generally—beginning in 2007.

2. See Ian Thomsen, *Stern Projects \$400 Million in Losses*, SI.COM, Feb. 13, 2010, http://sport-sillustrated.cnn.com/2010/writers/ian_thomsen/02/13/stern.all.star/index.html.

3. See Henry Abbott, *Stern Proposition*, ESPN.COM, Feb. 13, 2010, http://espn.go.com/blog/truehoop/post/_id/13183/stern-proposition.

4. See *Union Doubts Stern's Claim of \$400 Million in Losses for League*, SPORTINGNEWS.COM, Mar. 1, 2010, [http://www.sportingnews.com/blog/The_Baseline/entry/view/60053/union_doubts_sterns_claim_of_\\$400_million_in_losses_for_league](http://www.sportingnews.com/blog/The_Baseline/entry/view/60053/union_doubts_sterns_claim_of_$400_million_in_losses_for_league).

5. See Chris Tomasson, *Union President Fisher: Premature to Say NBA Salaries Too High*, FANHOUSE.COM, Mar. 1, 2010, <http://nba.fanhouse.com/2010/03/01/union-president-fisher-premature-to-say-nba-salaries-too-high/>. In addition to being the NBPA President, Fisher is a guard for the Los Angeles Lakers.

6. *Id.*

7. George M. Thomas, *Recession Puts Dents in Contract Extensions: LeBron, Bosh and Wade Facing Hard Decisions That They May Delay*, THE AKRON BEACON J., July 18, 2009, at SPORTS, <http://www.ohio.com/sports/cavs/51078942.html>. Operating losses are generally calculated in terms of earnings before interest, taxes, depreciation, and amortization. See Kurt Badenhausen, Michael K. Ozanian, & Christina Settimi, *The Business of Basketball*, FORBES.COM, Dec. 9, 2009, <http://www.forbes.com/2009/12/09/nba-basketball-valuations-business-sports-basketball-values->

season, and the lowly Sacramento Kings, which lost nearly \$25 million.⁸ A portion of these revenue losses can be attributed to the decline in gate receipts for the season. While the regular season gate receipts for the league as a whole were only down 0.2% from the 2007-08 season—\$2.66 million less than the \$1.1 billion in gate revenue generated during the previous season—this figure is somewhat misleading due to a dramatic increase in gate receipts for one particular team: the Seattle SuperSonics.⁹ During the 2007-08 season, the Seattle SuperSonics suffered its worst losing season in its forty-one year history.¹⁰ The team's poor performance, coupled with the anticipated relocation of the team from Seattle to Oklahoma City at the end of the season,¹¹ led to the team's lowest average attendance in seventeen years and the third lowest attendance in the NBA that season.¹² Once the team moved to Oklahoma City, a city hungry for a professional sports team of its own, the team increased attendance by more than 5,000 fans per game and by more than 200,000 fans for the season.¹³ In doing so, the Oklahoma City Thunder improved to the eleventh best attendance in the NBA for the 2008-09 season and enjoyed improved gate receipts of \$27.2 million—a 145% increase from

09-intro.html (noting that twelve of the NBA's thirty teams posted operating losses for the 2008-09 season).

8. Barry Jackson, *Although Star Players are Still Getting Big Contracts, the Reeling Economy is Affecting the Major U.S. Pro Leagues in Different Ways*, MIAMI HERALD, Mar. 8, 2009, at D10 (noting that Orlando Magic CEO Alex Martins stated that the team would likely lose between \$15 million and \$20 million for the 2008-09 season) and Ailene Voisin, *Change is in the Air: Arena Issue Looms Large as Losses Mount*, SACRAMENTO BEE, Feb. 10, 2009, at C1 (stating that the team could lose up to \$25 million for the 2008-09 season).

9. Ken Berger, *Head Straight to Gate for Sign of Weakness in NBA Money Machine*, CBSSPORTS.COM, July 8, 2009, <http://www.cbssports.com/nba/story/11934840>.

10. See Matt Levin, *Tulsans Ready for NBA*, TULSA WORLD, July 11, 2008, at B1.

11. See Jim Brunner, *Bennett Files to Move Sonics to Oklahoma City*, SEATTLE TIMES, Nov. 2, 2007, http://seattletimes.nwsourc.com/html/localnews/2003990107_sonicsmove03m.html.

12. See *Supersonics Attendance*, BASKETBALLREFERENCE.COM, <http://www.basketballreference.com/teams/teamatt.htm?tm=Sea&lg=n> (detailing the average attendance of 13,355 for the 2007-08 season and for all previous seasons) and *2007-08 Seattle Supersonics Roster and Statistics*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/teams/SEA/2008.html> (noting that the SuperSonics ranked 28th out of 30 in the NBA in attendance for the 2007-08 season with 547,556 fans attending games).

13. See *Oklahoma City Thunder Attendance*, DATABASEBASKETBALL.COM, <http://www.databasebasketball.com/teams/teamatt.htm?tm=OKC&lg=n> (noting the average attendance of 18,693 per game during the 2008-09 season—more than 5,000 fans on average more than the 13,355 per game during the 2007-08 season) and *Supersonics Attendance*, *supra* note __ (detailing the average attendance for the Seattle SuperSonics' previous forty-one seasons). Due to Hurricane Katrina, the New Orleans Hornets played much of their 2005-06 and 2006-07 seasons in Oklahoma City, but the move was always meant to be temporary. See Michael A. McCann, *Social Psychology, Calamities, and Sports Law*, 42 WILLAMETTE L. REV. 585, 590 (2006).

the team's final season in Seattle.¹⁴ Many experts believe that the team will not be able to sustain such attendance and gate receipts and that both will decline in time.¹⁵ In this regard, the Oklahoma City Thunder attendance during their inaugural season was likely an anomaly that falsely propped up the NBA's overall gate revenues for 2008-09.

The reality was that many teams experienced significant reductions in gate revenue for the 2008-09 season. For example, when compared to the 2007-08 season, the following teams saw reductions of more than \$5 million in their gate receipts: New Jersey Nets, \$11.4 million; Sacramento Kings, \$9.7 million; Toronto Raptors, \$9.1 million; Detroit Pistons, \$7.7 million; Los Angeles Clippers, \$6.8 million; and Miami Heat, \$5.3 million.¹⁶ In addition, the Charlotte Bobcats, Indiana Pacers, and Washington Wizards experienced a reduction in gate receipts in excess of \$4 million.¹⁷ Five NBA teams also generated less than \$500,000 in gate receipts per home game for the 2008-09 season: Atlanta Hawks, Indiana Pacers, Memphis Grizzlies, Milwaukee Bucks, and Minnesota Timberwolves.¹⁸ The reduction in gate receipts is particularly problematic for NBA teams because ticket revenue usually constitutes up to fifty percent of a team's yearly budget.¹⁹

The 2009-10 season looks equally grim, if not worse, for the league and its teams. Through the first month of the 2009-10 season, the average paid attendance in the league was down almost four percent from the year before.²⁰ Moreover, eighty to ninety percent of NBA teams are expected to lose money for the 2009-10 season.²¹ Some teams face potentially staggering losses. For example, the Charlotte

14. *2008-09 Oklahoma City Thunder Roster and Statistics*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/teams/OKC/2009.html> (noting that the team's season attendance of 766,868 ranked 11th out of 30 in the NBA for the 2008-09 season) and Berger, *supra* note __ (detailing the dramatic increase in attendance and gate receipts between the team's 2007-08 and 2008-09 seasons).

15. See Berger, *supra* note 9.

16. *Id.*

17. *Id.*

18. *Id.*

19. See John Lombardo & Tripp Mickle, *NBA, NHL Budgets Stressed by Flat Ticket Revenue Outlook*, SPORTSBUSINESSJOURNAL.COM, Mar. 2, 2009, <http://www.sportsbusinessjournal.com/article/61683>.

20. See Ken Berger, *NBA Ticket Revenue Slides 7.4 Percent*, CBSSPORTS.COM, Dec. 11, 2009, <http://ken-berger.blogs.cbssports.com/mcc/blogs/entry/11838893/18850386>.

21. See Chris Tomasson, *Stern Doesn't Expect Contentious All-Star Labor Negotiations*, FANHOUSE.COM, Feb. 12, 2010, <http://nba.fanhouse.com/2010/02/12/stern-doesnt-expect-contentious-all-star-labor-negotiations/> (noting that twenty-five to twenty-seven of the NBA's thirty teams were expected to lose money for the 2009-10 season).

Bobcats expect to lose upwards of \$30 million for the season.²² The Minnesota Timberwolves anticipate losing \$25 million.²³ While final figures will not be available until after the season ends, it is unsurprising that Commissioner Stern has bemoaned the financial state of the NBA and its teams as of late.

While a significant portion of teams' losses can be attributed to the reduction in gate receipts, most teams have lost revenue—or face the future loss of revenue—in other important business areas. For example, while the NBA claims that its games in the 2008-09 boasted more than ninety percent capacity, this figure is somewhat deceiving as it includes tickets that teams gave away without charging for them—it includes “comp tickets” that teams gave away—and tickets that were paid for, but the ticketholder did not attend the game.²⁴ In fact, the average attendance at NBA games during the 2008-09 season was 14,072—approximately seventy-three percent of arena capacity in the NBA.²⁵ Moreover, some teams struggled mightily with their actual attendance numbers: the Indiana Pacers, Milwaukee Bucks, and Sacramento Kings drew less than 11,000 per game; the Charlotte Bobcats and the Minnesota Timberwolves had average attendances below 10,000; and the Memphis Grizzlies had an average of 7,570 fans per game.²⁶ Such lackluster attendance also hurts teams' revenues, as teams depend on fans—even those with comp tickets—to pay for parking, souvenirs, and food and drink.²⁷

Decreased corporate support has also hurt the NBA and its teams. For example, the NBA lost long-time corporate partners McDonald's and Toyota when both chose not to renew their sponsorship deals with the league.²⁸ The league did, however, extend its seventeen-year sponsorship deal with Nike and added Taco Bell as a new corporate

22. See *NBA Board Approves Bobcats' Sale to Jordan*, NBA.COM, Mar. 17, 2010, <http://www.nba.com/2010/news/03/17/jordan.sale.ap/index.html>.

23. See Ken Helin, *Timberwolves Set to Lose \$25 Million*, NBCSPORTS.COM, Feb. 26, 2010, <http://probasketballtalk.nbcsports.com/2010/02/timberwolves-set-to-lose-25-million.php>.

24. See Berger, *supra* note 9 (describing the NBA's claim that its arenas were at 90.4% capacity for the 2008-09 season). In fact, some teams, such as the Atlanta Hawks, Minnesota Timberwolves, and New Jersey Nets, handed out an average of more than five thousand comp tickets per game.

25. *Id.*

26. *Id.*

27. *Id.*

28. See Rick Harrow & Karla Swatek, *The Tip-Off on the NBA's New Season: Expensive Acquisitions, A Last-Minute Referee Contract, and New Marketing Schemes Greet the 2009-2010 Basketball Season*, BUS. WEEK, Nov. 2, 2009, http://www.businessweek.com/lifestyle/content/nov2009/bw2009112_918819.htm. McDonald's had been an NBA corporate sponsor for nineteen years when it ended the relationship. *Id.*

sponsor.²⁹ Local sponsorships for individual teams have proven more challenging. Approximately forty percent of NBA teams' local sponsorship agreements come up for renewal annually.³⁰ Given the difficult economic times, teams have struggled to convince corporate sponsors to renew such agreements.³¹ Many teams have had to reduce the cost and/or length of the contract to keep local sponsors.³² Such creative sponsorship structuring has enabled many teams to reach their revenue goals in this area. However, this experience has suggested that the relationship of corporations and the NBA—and other professional sports leagues—may be changing because of the difficult economic times.

Indeed, with many businesses looking to cut expenses due to the economic downturn, NBA teams also face new challenges selling higher-priced seating such as premium seats and luxury suites. Before the 2008-09 season, many teams experienced declining renewals for premium seat sales.³³ Premium seats, or “club seats,” describe seating within sports facilities that boast enhanced amenities such as wait staff for concessions, access to exclusive clubs or lounges, better sight lines, and a wider variety and higher quality of food and beverage options—all for a ticket price significantly more expensive than traditional seating options.³⁴ When originally devised, teams envisioned premium seats as providing a significant revenue source for team owners.³⁵ However, even before the Great Recession, NBA teams found it difficult to sell premium seats and thus converted many of them into regular season ticket seating options.³⁶ With corporations less inclined to

29. *Id.*

30. See Tripp Mickle & John Ourand, *Premium-Seat Renewals Could Provide Even Tougher Challenge for NBA, NHL Franchises*, SPORTSBUSINESSJOURNAL.COM, Mar. 2, 2009, <http://www.sportsbusinessjournal.com/article/61758>.

31. See Dave McMenamin, *In Detroit, Pistons Try to Beat an Economic Full-Court Press*, NBA.COM, Feb. 17, 2009, http://www.nba.com/2009/news/features/dave_mcmenamin/02/17/detroit.20090217/.

32. See *id.* (describing the Detroit Pistons need to split sponsorship contracts between two different corporate sponsors because sponsors no longer wanted to pay for an entire forty-one game season) and Mickle & Ourand, *supra* note 30 (describing the different types of sponsorship deals that the Atlanta Hawks offered its corporate sponsors).

33. See Mickle & Ourand, *supra* note 30. For an analysis of luxury suite sales before the Great Recession, see Heather J. Lawrence, James Kahler, and Ron T. Contorno, *An Examination of Luxury Suite Ownership in Professional Sports*, 1 JOURNAL OF VENUE AND EVENT MANAGEMENT 1 (2009), available at <http://www.hrsn.sc.edu/JVEM/Vol1No1/LuxurySuites.pdf>.

34. See Frank A. Mayer, III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L.J. 195, 201 (2005) and Jack F. Williams, *The Coming Revenue Revolution in Sports*, 42 WILLIAMETTE L. REV. 669, 682 (2006).

35. See Mayer, III, *supra* note 34, at 202.

36. See Don Muret, *Once-Hot Club Seats Have Fewer Fans*, SPORTSBUSINESSJOURNAL.COM, Feb. 23, 2004, <http://www.sportsbusinessjournal.com/article/36932>.

pay for expensive premium seating, this problem has only grown worse. It has become increasingly clear that premium seating cannot be relied upon for the type of enhanced revenue stream that owners once hoped for.

NBA teams also experienced similar difficulties with luxury suites. Luxury suites are private rooms within sports facilities that offer catering services, access to private clubs or lounges, a comfortable environment to enjoy the game, a private bar, and optimal views of the game.³⁷ Luxury suites quickly became a favorite of team owners when building a new sports facility, as luxury suites were sold at a premium price that led to a substantial revenue stream—money that does not have to be shared under revenue sharing agreements.³⁸ While many NBA teams have corporations locked into longer-term agreements for these lucrative seating options—most usually have ten-year contracts—some of those deals are set to expire soon with little hope of anything close to one hundred percent renewal rates.³⁹ Moreover, many teams are experiencing luxury suites going “dark,” where the suites go unsold or the suite holders choose not to attend to save money on the food and drink that would have been consumed during the game.⁴⁰ The precarious nature of this revenue source poses great challenges for many teams, as such monies have traditionally constituted a significant portion of a team’s revenue stream.⁴¹

All of these revenue reductions are significant for the upcoming CBA renegotiation because they directly affect the NBA’s basketball related income (BRI), salary cap, and luxury tax threshold. The BRI is a term used in the NBA’s CBA to encompass most revenues generated by the NBA and its member teams.⁴² These monies include

37. See Sanjay Jose Mullick, *Browns to Baltimore: Franchise Free Agency and the New Economics of the NFL*, 7 MARQ. SPORTS L.J. 1, 16 (1996).

38. See Amanda Schlager, *Is the Suite Life Truly Sweet? The Property Rights Luxury Box Owners Actually Acquire*, 8 VAND. J. ENT. & TECH. L. 453, 456 (2006).

39. See Mickle & Ourand, *supra* note 30 (noting that the Atlanta Hawks, Denver Nuggets, and Toronto Raptors all have their ten-year agreements concluding at the end of the 2009-10 season) and Anthony Schoettle, *Sales of Luxury Suites Slow at Most Indianapolis Venues*, INDIANA BUSINESS JOURNAL, Oct. 17, 2009, <http://www.ibj.com/pro-teams-endure-notsuite-time/PARAMS/article/10587> (detailing the ending of the Indiana Pacers’ ten-year luxury suite contracts after the 2008-09 season and the difficulty renewing them).

40. See Bill Simmons, *Welcome to the No Benjamins Association*, ESPN.COM, Feb. 27, 2009, <http://sports.espn.go.com/espn/page2/story?page=simmons/090227>.

41. See Matthew J. Parlow, *Publicly Financed New Sports Facilities: Are They Economically Justifiable? A Case Study of the Los Angeles Staples Center*, 10 U. MIAMI B. L. REV. 483, 504 (2002) (detailing the importance of luxury suites as a revenue stream in new sports facility financing).

42. See NAT’L BASKETBALL ASS’N & NAT’L BASKETBALL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. VII, § 1(a) (executed July 29, 2005), available at <http://www.nbpa.org/>

ticket sales, television revenue, sponsorship agreements, and other income derived from basketball operations.⁴³ A reduction in BRI has a direct impact on the league's salary cap, which equals fifty-one percent of BRI.⁴⁴ The salary cap restricts teams from having player salaries that exceed this threshold unless it meets one of the enumerated exceptions listed in the CBA—thus constituting a “soft” salary cap.⁴⁵ Therefore, as the BRI declines, so does the salary cap—thus potentially limiting the ability of teams to sign new players or re-sign their existing players.

For the 2009-10 season, the NBA salary cap was \$57.7 million, down from \$58.68 million the season before.⁴⁶ This reduction in the salary cap marked only the second time that the salary cap decreased from one year to the next since the NBA first instituted a salary cap in the 1983-84 season.⁴⁷ Soon after the 2009-10 season began, predictions for the 2010-11 salary cap ranged from \$50 million to \$54 million.⁴⁸ In fact, just before the 2009-10 season began, the NBA league office told the NBA Board of Governors that the salary cap for the 2010-11 sea-

cba/2005 [hereinafter NBA COLLECTIVE BARGAINING AGREEMENT] (describing BRI as the aggregate operating revenues of the NBA or its member teams during a particular season).

43. Matthew Epps, *Full Court Press: How Collective Bargaining Weakened the NBA's Competitive Edge in a Globalized Sport*, 16 VILL. SPORTS & ENT. L.J. 343, 343-44 n.3 (2009). See also Larry Coon's NBA Salary FAQ, <http://members.cox.net/lmcoon/salarycap.htm#Q16> (last visited April 11, 2010) (listing numerous other revenue sources that are included in the BRI calculation, such as parking, concessions, forty percent of arena signage; forty percent of luxury suite revenue; forty-five to fifty percent of arena naming rights; and revenue generated from NBA Entertainment, the NBA All-Star Game, and other NBA special events). The BRI for the 2008-09 season was \$3.608 billion. See *id.*

44. See Chris Deubert & Glenn M. Wong, *Understanding the Evolution of the Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 8 UCLA ENT. L. REV. 179, 228-29 (2009) (noting that the NBA CBA calculates the league's salary cap as fifty-one percent of BRI). See also NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 42, at art. VII, § 12 (detailing the salary cap calculation).

45. See Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 276-77 (2008). See also James L. Perzik, *Mysteries of the NBA "Salary Cap" and the "Escrow and Tax" System*, SM009 ALI-ABA 149 (2007) (describing some of the enumerated exceptions to the salary cap contained in the NBA CBA, including the veteran free agent exception, the bi-annual exception, and the mid-level salary exception, to name but a few).

46. Press Release, National Basketball Association, NBA Salary Cap Set for the 2009-10 Season (July 7, 2009), available at <http://www.nba.com/2009/news/07/07/salarycap.ap/index.html>. The salary cap was \$49.5 million in 2005-06; \$53.135 million in 2006-07; and \$55.63 million in 2007-08. See Larry Coon's NBA Salary FAQ, *supra* note 43.

47. Marc Stein, *2010 Cap May Limit Signings*, ESPN.COM, July 8, 2009, <http://sports.espn.go.com/nba/news/story?id=4312837>.

48. Mark J. Miller, *Drastic Drop Not Expected in NBA Salary Cap*, SPORTS.YAHOO.COM, Dec. 24, 2009, <http://sports.yahoo.com/nba/rumors/post/Drastic-drop-not-expected-in-NBA-salary-cap?urn=nba,210738> (discussing different salary cap projections being used by NBA teams for the 2010-11 season).

son would likely be around \$52 million.⁴⁹ However, the salary cap for the 2010-11 season will be approximately \$56.1 million, which constitutes a smaller drop than many anticipated.⁵⁰ Nevertheless, even this figure is problematic for teams. Before the Great Recession, the anticipated salary cap for the 2010-11 season was approximately \$63 million—creating the likelihood that the actual salary cap could be nearly \$7 million less than anticipated a mere two years ago when teams started long-term strategic planning for the 2010-11 season.⁵¹

In an era of declining revenues, this type of limitation on spending imposed by a salary cap may appear desirable and beneficial to the owners. However, the salary cap is coupled with a luxury tax threshold that poses a significant economic penalty for teams that exceed it. The luxury tax threshold is determined by taking sixty-one percent of BRI—minus projected benefits and adjusting for whether the prior season's BRI exceeded or fell short of its projected level—and dividing it by the number of teams in the league.⁵² Any team whose collective salaries exceed the luxury tax threshold must pay a dollar-for-dollar penalty to the league for this differential.⁵³ The league then distributes this money to the teams that do not exceed the luxury tax.⁵⁴ For the 2008-09 season, the luxury tax threshold was \$71.150 million, and the following teams exceeded that amount and had to pay the NBA the dollar for dollar penalty: New York Knicks (\$23.9 million), Dallas Mavericks (\$23.6 million), Cleveland Cavaliers (\$13.7 million), Boston Celtics (\$8.3 million), Los Angeles Lakers (\$7.2 million), Portland Trailblazers (\$5.9 million), and the Phoenix Suns (\$4.9 million).⁵⁵ The luxury tax threshold for the 2009-10 season is \$69.92 million and is projected to be around \$68 million for the 2010-11 season.⁵⁶

49. Chris Sheridan, *What Will Next Summer's Salary Cap Be?*, ESPN.COM, Dec. 24, 2009, http://espn.go.com/blog/truehoop/post/_id/11723/what-will-next-summers-salary-cap-be. Some agents who are familiar with the league's financial situation are projecting a salary cap more in the range of \$54 million. *Id.*

50. See Chris Sheridan, *NBA Cap Projection Higher Than Thought*, ESPN.COM, April 17, 2010, <http://sports.espn.go.com/nba/news/story?id=5099980>.

51. See Stein, *supra* note 47.

52. See Larry Coon's *NBA Salary FAQ*, *supra* note 43.

53. See Christine Snyder, Note, *Perfect Pitch: How U.S. Sports Financing and Recruiting Models Can Restore Harmony Between FIFA and the EU*, 42 CASE W. RES. J. INT'L L. 499, 522 (2009).

54. See Larry Coon's *NBA Salary FAQ*, *supra* note 43.

55. *Id.*

56. See Stein, *supra* note 47 (noting the 2009-10 luxury tax threshold) and Sheridan, *supra* note — (noting the 2010-11 projected luxury tax threshold).

The reductions in the salary cap and luxury tax threshold projections are due to an anticipated drop in BRI for the 2009-10 season, which will be used to calculate both the salary cap and luxury tax threshold for the 2010-11 season.⁵⁷ The problem with such reductions is that many teams have signed several of their players to long-term, guaranteed contracts—up to five or six years, depending on the type of contract—that contain raises as high as eight to ten percent per year.⁵⁸ Many teams agreed to these contracts during better economic times, when projections indicated healthy future increases in the BRI and, accordingly, the salary cap and luxury tax threshold.⁵⁹ This situation creates two issues for teams. First, as the salary cap declines, teams become less able to sign new players as they lose room under the salary cap as their payroll increases. More importantly, from an economic standpoint, the decrease in the luxury tax threshold will lead to many teams being locked into guaranteed contracts that substantially raise their payroll every year. However, the current decline in BRI reduces the luxury tax and thus costs owners millions of dollars in the dollar-for-dollar penalty on the excess payroll above the luxury tax threshold. This fundamental flaw in the NBA's current economic structure helps provide some context for the likely subjects of the renegotiation of the NBA's CBA.

B. Temporary Solutions to Revenue Problems

The renegotiation of the NBA's CBA is still a year away and any relief for team owners would come, at the earliest, during the 2011-12 season. In the meantime, teams continue to struggle with the economic realities and challenges of the Great Recession.⁶⁰ Unsurprisingly, the NBA and its teams have been taking temporary measures to help address the aforementioned revenue and financial issues. For example, toward the end of the 2008-09 season, the league secured a \$200 million line of credit to allow fifteen teams to borrow money to

57. See Larry Coon's *NBA Salary FAQ*, *supra* note 43.

58. See Fran Blinebury, *Summer Market May Be More Wind Than Windfall*, NBA.COM, Feb. 25, 2009, http://www.nba.com/2009/news/features/fran_blinebury/02/24/fran.20090224/ (noting that mid-level exceptions contracts—which can run for up to five years—contain eight percent raises per year, while maximum contract extensions contain ten percent raises per year).

59. *Id.*

60. It is worth noting that one positive factor that enables NBA teams to avoid complete financial disaster during this difficult economic period is deriving a share of the league's eight-year, \$7.4 billion broadcast rights contract that does not expire until 2015. See Berger, *supra* note __. Without this healthy revenue stream, the NBA and its teams would be dealing with far greater economic challenges than those they currently face.

help them during these difficult economic times.⁶¹ The NBA allowed teams to use the money for whatever purposes they wanted, and many expected teams to use it to help cover operating losses for the year.⁶² Twelve teams accepted the offer and were able to secure amounts ranging from \$13 million to \$20 million per team.⁶³

The league and its teams have also used layoffs to offset the declining revenue streams they face. In fact, the NBA was the first major professional sports league⁶⁴ to announce that it would lay off a significant portion of its workforce.⁶⁵ Some teams, like the Charlotte Bobcats, also laid off employees.⁶⁶ Other teams, like the Boston Celtics, chose to leave vacant front office positions unfilled to avoid making layoffs in the future.⁶⁷ In addition, many teams reduced the number of assistant coaches, scouts, and even the number of players on their roster to cut costs.⁶⁸ Finally, some teams imposed across-the-board budget cuts to their operating budgets to address the drop in revenue.⁶⁹

To combat drops in attendance, many teams have reduced or frozen ticket prices or offered special ticket packages to maintain and attract sizable crowds. For the 2009-10 season, nineteen teams froze their season ticket prices, seven decreased their season ticket prices, and only three teams increased their season ticket prices.⁷⁰ In fact, for the

61. Daniel Kaplan & John Lombardo, *NBA Securing \$175M for Clubs*, SPORTSBUSINESSJOURNAL.COM, Feb. 16, 2009, <http://www.sportsbusinessjournal.com/article/61537> (detailing the original announcement of \$175 million); Tim Lemke, *NBA Gets a Loan*, WASHINGTONTIMES.COM, Feb. 26, 2009, <http://www.washingtontimes.com/news/2009/feb/26/nba-set-to-acquire-175-million-line-of-credit/> (reporting on the additional \$25 million secured by the league).

62. See Matt Egan, *NBA Secures \$200 Million Despite Credit Crisis*, FOXBUSINESS.COM, Feb. 26, 2009, <http://www.foxbusiness.com/story/markets/industries/entertainment/nba-secures-m-despite-credit-crisis/>.

63. See *NBA Lines Up \$200 Million for Teams*, ESPN.COM, Feb. 27, 2009, <http://sports.espn.go.com/nba/news/story?id=3936991>.

64. It is generally accepted that the four major American professional sports leagues are the NBA, NFL, NHL, and MLB.

65. See *League to Lay Off About 80 Amid Economic Slowdown*, STERN SAYS, ESPN.COM, Oct. 13, 2008, <http://sports.espn.go.com/nba/news/story?id=3640507>.

66. Steve Aschburner, *NBA Taking Preventative Measures During Slow Economic Times*, SI.COM, Oct. 8, 2008, http://sportsillustrated.cnn.com/2008/writers/steve_aschburner/10/07/nba.economy/index.html (noting that the Bobcats laid off thirty-five members of their front office staff).

67. *Id.*

68. See Geoffrey A. Arnold, *NBA Teams Cut Rosters, Assistants, Scouts to Reduce Costs*, THE OREGONIAN, Oct. 26, 2009, http://www.oregonlive.com/nba/index.ssf/2009/10/nba_teams_shrink_rosters_assis.html.

69. See Lombard & Mickle, *supra* note 19. The New Jersey Nets, for example, offered their assistant coaches one-year contracts with a twenty-five percent cut in salary. See Arnold, *supra* note 68.

70. *Id.*

2010-11 season, the Detroit Pistons, Golden State Warriors, Miami Heat, Minnesota Timberwolves, and Sacramento Kings have already announced that they will reduce season ticket prices, while other teams—including the Oklahoma City Thunder and Phoenix Suns—have frozen ticket prices for the upcoming season.⁷¹ In addition, many teams have stopped requiring one lump sum payment for season tickets, moving instead to payment plans that can stretch for up to twelve months—to help fans better afford tickets by paying for them over time.⁷² Finally, many teams have also put together competitive ticket packages to draw in fans. For example, for the 2008-09 season, the Chicago Bulls had a buy-one-get-one-free promotion; the Memphis Grizzlies sold “Family Fun Packs” that included four tickets, four Pepsis, and four hot dogs for forty-eight dollars; the Indiana Pacers offered a promotion where fans could buy eleven games for the price of eight; and the New Jersey Nets sold 1,300 tickets for a package price of \$440, equaling \$10 per game.⁷³ In these regards, many teams have been forced to implement creative approaches to their ticket sales to meet their attendance and revenue goals during these challenging economic times.

71. See *Amid Losing Season, Pistons Cut Prices for 2010-11*, SI.COM, April 12, 2010, <http://sportsillustrated.cnn.com/2010/basketball/nba/wires/04/12/2030.ap.bkn.pistons.tickets.0094/> (Detroit Pistons); Marcus Thompson, II, *Golden State Warriors Offer Season Ticket-Holders Price Reductions for Next Season*, OAKLAND TRIBUNE, Mar. 16, 2010, available at http://www.insidebayarea.com/ci_14689109?source=most_email (Golden State Warriors); Sarah Talalay, *Miami Heat Freezing Season Ticket Prices, Holding Scavenger Hunt for Prizes*, SUNSENTINEL.COM, Feb. 23, 2010, http://blogs.trb.com/sports/custom/business/blog/2010/02/miami_heat_freezing_season_tic.html (Miami Heat); *Wolves to Cut '10-11 Season Ticket Costs in March*, SPORTS.YAHOO.COM, Feb. 22, 2010, <http://sports.yahoo.com/nba/news?slug=ap-timberwolves-tickets> (Minnesota Timberwolves); Darnell Mayberry, *Thunder Will Not Increase Season Ticket Prices*, OKLAHOMAN, Mar. 2, 2010, available at <http://newsok.com/thunder-will-not-increase-season-ticket-prices/article/3443176> (Oklahoma City Thunder); *Suns Won't Raise Season-Ticket Prices for 2010-11*, SPORTINGNEWS.COM, Feb. 10, 2010, <http://www.sportingnews.com/nba/article/2010-02-10/suns-wont-raise-season-ticket-prices-for-2010-11> (Phoenix Suns); and Sam Amick, *Kings Cut 2010-11 Season Ticket Prices*, SACRAMENTO BEE, Feb. 17, 2010, at 1C, <http://www.sacbee.com/2010/02/17/2542284/kings-cut-2010-11-season-ticket.html> (Sacramento Kings). Other teams, including the Atlanta Hawks, Milwaukee Bucks, and Portland Trailblazers have all increased season ticket prices for the 2010-11 season. See Michael Cunningham, *Some Hawks Season-Ticket Holders Hit With Big Price Hike*, ATLANTA JOURNAL-CONSTITUTION, Mar. 20, 2010, available at <http://www.ajc.com/sports/atlanta-hawks/some-hawks-season-ticket-387708.html> (Atlanta Hawks); Don Walker, *Bucks Raise Season-Ticket Prices*, JSONLINE.COM, Mar. 4, 2010, <http://www.jsonline.com/sports/bucks/86453212.html> (Milwaukee Bucks); and Joe Freeman, *Trail Blazers Fans Renew Season Tickets at High Rate Despite Increased Prices*, OREGONIAN, Mar. 16, 2010, available at http://blog.oregonlive.com/behindblazersbeat/2010/03/trail_blazers_fans_renew_season.html (Portland Trailblazers).

72. See Lombardo & Mickle, *supra* note 19.

73. See Simmons, *supra* note 47 (noting the Chicago Bulls' and Memphis Grizzlies' promotions) and Aschburner, *supra* note 66 (detailing the Indiana Pacers' and New Jersey Nets' promotions).

Overall, the NBA has experienced severe economic challenges that it has not faced in decades, if ever. The drop in BRI and the losses sustained have led the league and its teams to adjust the ways in which they do business—cutting expenses and crafting creative ticket packages to draw a sufficient attendance. However, the effects of the Great Recession on the NBA can perhaps be most distinctly observed in how the current economic circumstances have impacted the players.

III. THE EFFECTS ON THE PLAYERS

The reduction in the BRI and the attendant decrease in the salary cap and luxury tax threshold have forced NBA teams to reconsider their approaches to filling their player rosters. Such adjustments have impacted players in the areas of free agent signings, shrinking rosters, and buy-outs of player contracts. Interestingly, these changes have also seemed to benefit the more economically successful teams at the expense of the teams struggling in the current economic downturn.

As discussed above, the decrease in the salary cap reduced the number of teams with room under the salary cap to sign free agents during the free agent signing period before the 2009-10 season. This was due, in part, to teams agreeing to guaranteed contracts with players that were signed years before the Great Recession began when the NBA anticipated revenues—and thus the salary cap—to rise each year.⁷⁴ Moreover, many of the teams that had salary cap space this past off-season—such as the Memphis Grizzlies and Minnesota Timberwolves—were teams that could not afford to increase their payroll because of their existing losses.⁷⁵ Consequently, there were not as many teams looking to sign free agents, and those that were faced the restrictions of the salary cap that limited the amount they were able to pay the players.

Teams with expensive, long-term player contracts—those that caused salary cap inflexibility for many teams—were unable to trade these contracts to create salary cap space for free agent signings for two reasons. First, the CBA limits the difference in salaries between two trading teams to 125% plus \$100,000.⁷⁶ In this regard, teams mak-

74. See Blinbury, *supra* note 58.

75. See Eric Pincus, *Rumors: A Fresh Look at the 2009 Cap Teams*, HOOPSWORLD.COM, Feb. 27, 2009, http://www.hoopsworld.com/Story.asp?story_id=11764.

76. See Larry Coon's *NBA Salary FAQ*, *supra* note 43. If two teams involve another team or two in the trade, one or more teams may be able to create more significant salary cap space because the differential in contracts being traded can be spread out more unevenly among the teams involved in the trade. *Id.* However, multi-team trades are naturally more complicated to accomplish. Moreover, as discussed further above, most teams were looking to shed payroll, thus limiting potential trade partners willing to agree to such trades.

ing such trades can only create a limited amount of salary cap space through such trades. Second, with the reduction in the salary cap and luxury tax threshold, most teams sought to shed payroll to remain under the salary cap or, at the very least, to avoid paying the luxury tax.⁷⁷ This like-mindedness among teams led to few offseason trades that enabled teams to free up salary cap space for free agent signings.

Rather, teams' focus on avoiding the luxury tax led to a depressed free agent market for the summer of 2009 where marquee players had to take significant pay cuts and sign contracts for far less money than they would have before the Great Recession.⁷⁸ For example, after making more than \$10 million a year for the past several years, Mike Bibby signed a three-year, \$18 million contract with the Atlanta Hawks.⁷⁹ Jason Kidd signed a three-year, \$25 million contract with the Dallas Mavericks after making \$21.4 million that past season.⁸⁰ Rasheed Wallace took a pay cut of more than fifty percent in signing a two-year contract with the Boston Celtics.⁸¹ Ron Artest and Trevor Ariza, players who had very successful 2008-09 seasons, would have normally been in high demand and commanded fairly lucrative multi-year contracts.⁸² Instead, both players accepted five-year contracts at the mid-level exception starting at \$5.854 million—contracts that many deemed to be far below their normal market value.⁸³

One reason for this change in free agent contracts was the salary cap limitations imposed by the CBA. For example, if a team was over the salary cap—and most teams who were looking to add free agent players were—there were only two main possibilities for those teams to sign players under the CBA: the mid-level exception or the veteran's minimum exception.⁸⁴ The mid-level exception allows a team over the salary cap to sign a player for an amount equal to the average NBA salary.⁸⁵ The veteran's minimum exception allows a team over the salary cap to sign a veteran player to a contract for a set modest salary—usually around \$1 million—that is determined by the number

77. See Shaun Powell, *In Changing Economy, Expiring Contracts a Golden Ticket*, NBA.COM, Dec. 29, 2009, http://www.nba.com/2009/news/features/shaun_powell/12/29/contracts/index.html.

78. See Howard Beck, *Midlevel Exception Becoming a Norm*, NYTIMES.COM, July 7, 2009, <http://query.nytimes.com/gst/fullpage.html?res=9900E0DB1431F934A35754C0A96F9C8B63>.

79. See Berger, *supra* note 9.

80. See Beck, *supra* note 78.

81. *Id.*

82. See Berger, *supra* note 9.

83. See Beck, *supra* note 78.

84. See Perzik, *supra* note 45.

85. See *id.*

of years the players has been in the league.⁸⁶ In this regard, because the few teams seeking to sign free agents were already over the salary cap, the NBA CBA limited the amount of money they could offer to those players. The other reason for this shift in the free agent market was that teams facing growing losses from the economic downturn were simply unwilling to pay marquee player salaries as they were already facing significant revenue losses.

This reluctance to increase payroll also affected many average players' ability to obtain a guaranteed, multi-year contract.⁸⁷ Before the Great Recession, players that averaged five points per game or more were all but ensured a guaranteed contract and oftentimes a multi-year contract.⁸⁸ However, the Great Recession created a far more challenging market for such players. For example, NBA veterans Rashard McCants and Desmond Mason settled for non-guaranteed, one-year contracts for the 2009-10 season with the Houston Rockets and Sacramento Kings, respectively.⁸⁹ Joey Graham, a player who averaged a career-best 7.7 points per game during the 2008-09 season, commented that the reason he only received a non-guaranteed, one-year contract for the 2009-10 season was "because of the recession and because a lot of teams are bankrupt."⁹⁰ Finally, many believe that free agents during the summer of 2010 will face teams wanting to offer one-year contracts that would expire in 2011 when the NBA CBA terminates and a potential lockout by the owners might take place.⁹¹ In all of these regards, the Great Recession caused a rather dramatic shift in the NBA free agent market, affecting both marquee and average players who are settling for cheaper, shorter, and sometimes non-guaranteed, contracts.

NBA players also faced a more competitive free agent market because teams decided to carry fewer players on their rosters than in past years. The CBA requires teams to carry a minimum of thirteen players and a maximum of fifteen players.⁹² In the past, teams tended

86. See Larry Coon's *NBA Salary FAQ*, *supra* note 43. See also *Minimum Annual Salary Scale*, NBA.COM, Aug. 4, 2005, at http://www.nba.com/news/cba_minimumsalary_050804.html.

87. See Chris Tomasson, *Teams Might Remain Stingy in Handing Out Guaranteed Contracts*, FANHOUSE.COM, Sept. 26, 2009, http://nba.fanhouse.com/2009/09/26/teams-might-remain-stingy-in-handing-out-guaranteed-contracts/?sms_ss=email.

88. See *id.*

89. *Id.*

90. *Id.*

91. Brian Karpuk, *Will There Be An NBA Lockout in 2011?*, NEWSBURGLAR.COM, June 3, 2009, <http://newsburglar.com/2009/06/03/nba-lockout-2011/>.

92. See Larry Coon's *NBA Salary FAQ*, *supra* note 43.

to carry a roster with the maximum fifteen players.⁹³ However, in an attempt to cut costs during the difficult economic times, many teams started the 2009-10 season with fewer than this maximum player roster.⁹⁴ In fact, at the beginning of the 2009-10 season, three teams had thirteen players on their roster; seven teams had fourteen players; and the remaining twenty teams had the maximum fifteen players.⁹⁵ While smaller rosters provide teams with less flexibility and more vulnerability to player injuries, the economic circumstances necessitated such reductions in team rosters—thus providing fewer jobs for players in the league.

Finally, the recent economic downturn has also given rise to teams' almost maniacal interest in expiring contracts, particularly those that teams can buy out for less than the remaining amount owed. In order to free up salary cap space or to bring their payroll below the luxury tax threshold—whether for the current season or the following one—many teams actively sought trades where they would trade players with longer-term contracts in exchange for players with expiring contracts.⁹⁶ Such trade scenarios oftentimes led to seemingly imbalanced trades from a player talent perspective. For example, the New Jersey Nets traded all-star guard Vince Carter to the Eastern Conference Champion Orlando Magic for the expiring contracts of Tony Battie and Rafer Alston, as well as for Courtney Lee, who was scheduled to make only \$1.3 million for the 2009-10 season.⁹⁷ The Nets agreed to this trade largely for financial reasons—to reduce their payroll for the 2010-11 season when Battie's and Alston's contracts expired—while the Magic sought to use the trade to add a premier player that would help them improve in their quest for an NBA championship.

Similarly, before the 2009-10 season, the Milwaukee Bucks traded Richard Jefferson—one of their best, though higher-priced players—to the San Antonio Spurs for Kurt Thomas and Bruce Bowen.⁹⁸ From a talent standpoint, the Spurs clearly got the better part of the trade. However, the Bucks—facing significant financial difficulties—got two expiring contracts with Thomas and Bowen that proved valuable be-

93. See Paul J. Weber, *Economy May Hurt NBA Team Rosters*, ABCNews.com, Oct. 23, 2009, <http://abcnews.go.com/Sports/wireStory?id=8902096>.

94. *Id.*

95. *Id.*

96. See Berger, *supra* note 9.

97. *Id.* The Orlando Magic also received Ryan Anderson in the trade.

98. See Chad Ford, *Bucks Deal Jefferson to Spurs*, ESPN.COM, June 24, 2009, <http://sports.espn.go.com/nba/news/story?id=4281291>. The Spurs also sent Fabricio Oberto to the Detroit Pistons, who sent Amir Johnson to the Bucks as well. *Id.*

cause they would provide payroll relief for the 2010-11 season.⁹⁹ Moreover, Bowen's contract was only partially guaranteed—for \$2 million of the \$6.35 million owed on the contract—and thus the Bucks also received immediate payroll relief by releasing Bowen.¹⁰⁰

Teams also have a keen interest in contracts that they can buy out because it can provide them with luxury tax relief. If a team can buy out a player's contract for less than the amount owed on it, the team's payroll is thus reduced. For teams that are slightly above the luxury tax threshold, such a reduction from a contract buyout can lower their payroll to the point where they avoid paying the dollar-for-dollar luxury tax.¹⁰¹ For many players who are traded, the option of a contract buyout can be attractive as they can then sign with another team that may provide opportunities for more playing time, a long-term contract, and/or the possibility of playing for a championship. In these regards, the NBA trading market has become dominated by expiring contracts and contract buyouts as teams in financial trouble seek players with expiring contracts to enable them to reduce their payroll and possibly provide salary cap flexibility or even avoid luxury tax payments.

These changes in the market for NBA player services has not only negatively impacted players' salaries and opportunities, they have also potentially exacerbated an existing divide within the NBA between the "haves" and the "have-nots." The teams that are experiencing success on the basketball court are also the teams that are doing the best financially.¹⁰² These teams include the Boston Celtics, Cleveland Cavaliers, Dallas Mavericks, and the Los Angeles Lakers.¹⁰³ In this changed NBA player market, these teams—the "haves"—can take advantage of many of the other teams that are looking to save money. As discussed above, teams in financial straits—the "have-nots"—will trade a marquee player that is signed for a longer-term, guaranteed contract for players with expiring contracts (particularly those that can be bought out). The haves are in a financial position to take on the longer-term contract with guaranteed money because they are in

99. See Berger, *supra* note 9.

100. See Ford, *supra* note 98.

101. See Marty Burns, *All the Rage: Webber Just the Latest Player to Get Contract Buyout*, SI.COM, Jan. 12, 2007, http://sportsillustrated.cnn.com/2007/writers/marty_burns/01/12/contract.buyouts/index.html.

102. See Bill Simmons, *How to Change Your NBA Destiny*, ESPN.COM, Dec. 23, 2009, <http://sports.espn.go.com/espn/page2/story?page=simmons/091223&sportCat=nba>. To be sure, there are teams like the Orlando Magic that have experienced great success on the court but that continue to face financial challenges. However, as a general matter, the proposition that the successful teams are also the most financial stable teams seems to hold true.

103. See *id.*

healthier financial shape and are likely seeking to improve their chances of winning a championship. Due to their financial challenges, the have-nots must trade superior talent for inferior talent to gain payroll relief—and possibly luxury tax relief—for either that season or the next season. Moreover, because of the depressed free agent market, teams like the Los Angeles Lakers can afford to not only use their mid-level exception to sign a player despite being over the salary cap and luxury tax threshold, but they can sign an elite player like Ron Artest because of the lack of demand for his services by financially struggling teams. Consequently, the better and more financially sound teams in the league create a greater gap between their talent level and that of the have-nots, who must make trade and free agent decisions based largely on economic concerns rather than on competitive ones.

All of these changes brought about by the Great Recession—from the decline in revenue—have had a significant effect on the NBA, its teams, and its players. These problems with the NBA's current financial structure—whether created or unearthed by the economic downturn—will spur proposed reforms sought by both sides when labor and management renegotiate the CBA before the 2011-12 season.

IV. THE RENEGOTIATION OF THE CBA

The renegotiation of the NBA CBA looms large, and there is already talk about a possible lockout by the owners. To properly contextualize the likely controversial CBA terms that will be heavily negotiated, it is important to analyze their relevance to the collective bargaining process and to situate the significance of the collective bargaining process in sports, labor, and employment law.

A. *The Collective Bargaining Process*

The CBA is the “‘supreme governing authority’ concerning employment” in professional sports leagues that is created through the collective bargaining process.¹⁰⁴ The National Labor Relations Act (NLRA) provides for the collective bargaining process, where a professional sports league's owners and players' union can negotiate the rules and regulations of the relationship between the two sides.¹⁰⁵ In *American League of Prof'l Baseball Clubs v. Ass'n of National Baseball League*

104. Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008).

105. 29 U.S.C. § 151-169 (originally enacted in 1935); *see also* 29 U.S.C. § 159(d) (“to bargain collectively is the performance of the mutual obligation of the employer and the representative

Umpires,¹⁰⁶ the National Labor Relations Board (NLRB) established its jurisdiction over professional sports leagues in holding that Congress had intended for the NLRB to apply to Major League Baseball.¹⁰⁷ Through this holding, the NLRB applied the NLRA to professional sports. The NLRA thus allowed players to unionize and the players' union to negotiate with the league regarding the terms of employment and other related subjects for their members through the collective bargaining process.¹⁰⁸

For a CBA to be valid, both the players' union and the league must ensure that certain requirements of the collective bargaining process are met. The collective bargaining negotiations must include certain mandatory subjects of collective bargaining, including hours, wages, and working conditions.¹⁰⁹ If either side refuses to negotiate on a mandatory subject of collective bargaining, such a refusal constitutes a violation of the duty to collectively bargain and results in an unfair labor practice.¹¹⁰ Both sides must also negotiate in good faith.¹¹¹ Fi-

of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment").

106. *Am. League of Prof'l Baseball Clubs v. Ass'n of Nat'l Baseball League Umpires*, 180 NLRB 190 (1969).

107. *See id.* at 191. Before this case, there had been a string of cases that held that Major League Baseball (MLB) did not engage in interstate commerce. *See Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972). The NLRB navigated around this precedent, noting that the U.S. Supreme Court acknowledged that MLB was engaged in interstate commerce, but refused to overturn these cases based on *stare decisis*. *See* Joshua M. Kimura, *The Return of the Natural: How the Federal Government Can Ensure that Roy Hobbs Outlasts Barry Bonds in Major League Baseball*, 16 *SPORTS LAW. J.* 111, 135 (2009). Moreover, the U.S. Supreme Court had also held that all other professional sports leagues were engaged in interstate commerce. *See Radovich v. Nat'l Football League*, 352 U.S. 445, 451-52 (1957).

108. Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 *SPORTS LAW. J.* 189, 191-92 (2003). Like other employee unions, a players' unions can seek certification when (1) the union can show that it has a substantial allegiance among the players; (2) the union petitions the NLRB to hold a secret ballot election; and (3) if the union garners a majority of the players' votes, the NLRB certifies the union as the exclusive bargaining agent of all of the players. *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 *IND. L.J.* 1589, 1589 (2008). As the exclusive representative of the players, the union has a duty of fair representation that ensures the union represents all of its members "fairly, impartially, and in good faith." *See* Jan Stiglitz, *Player Discipline in Team Sports*, 5 *MARQ. SPORTS L.J.* 167, 173 (1995) (citing *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944)).

109. Michael J. Redding & Daniel R. Peterson, *Third and Long: The Issues Facing the NFL Collective Bargaining Agreement Negotiations and the Effects of an Uncapped Year*, 20 *MARQ. SPORTS L. REV.* 95, 98 (2009).

110. *See* Brian D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 *MARQ. SPORTS L. J.* 205, 218 (2007).

111. Walter T. Champion, Jr., "Mixed Metaphors," *Revisionist History and Post-Hypnotic Suggestions on the Interpretation of Sports Antitrust Exemptions: The Second Circuit's Use in Claret*

nally, both sides must engage in bona fide, arms-length bargaining.¹¹² If these requirements are met and the players' union and the league reach agreement, the result of the negotiation process will be a finalized CBA.¹¹³

The CBA proves significant for many reasons. For example, the CBA, including its terms and conditions of employment for the players, enjoy special protection from antitrust laws. As one scholar has noted, "[t]here is an inherent conflict between labor laws and antitrust laws."¹¹⁴ On the one hand, labor law seeks to further collective bargaining to reach agreement between unions and multi-employer bargaining units.¹¹⁵ Underlying labor laws is the belief that without unionization and the collective bargaining process, workers will not be able to achieve fair market value for their services.¹¹⁶ To this end, labor laws "were enacted to enable collective action by union members to achieve wage levels that are higher than would be available on the free market."¹¹⁷ On the other hand, underlying antitrust laws is the belief that collusion among competing businesses hurts consumers as these businesses manipulate pricing and market conditions.¹¹⁸ Accordingly, antitrust laws prohibit restraint on trade or commerce, including in labor markets.¹¹⁹

A tension between these two areas of law arises—as it does in the professional sports context—because multi-employer bargaining can involve all of the employers or potential employers for a specific

of a Piazza-like "Innovative Reinterpretation of Supreme Court Dogma", 20 MARQ. SPORTS L. REV. 55, 67 (2009).

112. See Jeffrey Hoffmeyer, *Fourth Down and an Appeal: The Nonstatutory Exemption to Antitrust Law in Claret v. National Football League*, 13 SPORTS LAW. J. 193, 199 (2006).

113. See George T. Stiefel, III, Comment, *Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1229 (2008).

114. Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C.L. REV. 212, 223 (2009).

115. See *id.*

116. See Michael C. Harper, *Multiemployer Bargaining, Antitrust Laws, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1692 (1997).

117. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 253 (1996) (Stevens, J., dissenting).

118. Marc Edelman & Brian Doyle, *Antitrust and "Free Movements" Risks of Expanding U.S. Professional Sports Leagues Into Europe*, 29 NW. J. INT'L L. & BUS. 403, 413-15 (2009) (describing antitrust laws related to labor restraints).

119. See Harper, *supra* note 116, at 1692; see also Sherman Antitrust Act, 15 U.S.C. § 1 (1890) ("[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal"). Antitrust laws apply to all professional sports leagues, with the exception of MLB. See John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705 (1977); see also *Fed. Baseball Club of Baltimore*, 259 U.S. at 200 (establishing MLB's antitrust exemption); *Toolson*, 346 U.S. at 356 (upholding MLB's antitrust exemption); *Flood*, 407 U.S. at 258 (upholding MLB's antitrust exemption); *Radovich*, 352 U.S. at 447 (holding that professional sports leagues, other than MLB, were engaged in interstate commerce and thus were not exempt from antitrust laws).

group of workers.¹²⁰ In this regard, this situation restrains these workers' ability to negotiate for employment in the free market.¹²¹ To address this conflict, courts and legislatures have developed both statutory and nonstatutory exemptions that make the collective bargaining process and the resultant CBA immune from antitrust laws.¹²² The most relevant exemption for professional sports leagues is the nonstatutory exemption. For the nonstatutory exemption to apply, the circumstances must meet a three-prong test. First, the restraint that would otherwise violate antitrust laws must "primarily affect[] only the parties to the collective bargaining relationship."¹²³ Next, the restraint must involve a mandatory subject of collective bargaining.¹²⁴ Lastly, the collective bargaining must have been accomplished through arms-length bargaining.¹²⁵ If the restraint at issue meets all three parts of the test, it is exempt from antitrust laws. If properly negotiated, the CBA is immune from antitrust laws and it thus serves as the definitive governing document regarding the terms and conditions of players' employment. In this regard, the league cannot unilaterally change these terms and conditions without engaging in the collective bargaining process.¹²⁶ To that same end, players cannot change the terms and conditions of their employment—including rules governing contracts and the like—without engaging in collective bargaining. This context helps explain the importance of the upcoming NBA CBA renegotiation and why the stakes are so high regarding the proposed changes that each side seeks.

B. Likely Issues in the CBA Renegotiation

In light of the economic woes facing many NBA teams, many predict that the owners will lock out the players as soon as the current CBA expires after the 2010-11 season unless the NBPA agrees to major concessions.¹²⁷ Based on the economic problems detailed above, NBA Commissioner David Stern and team owners want to reduce the amount of revenue devoted to players' salaries, cut back player sala-

120. See Alford, *supra* note 114, at 223.

121. See *id.*

122. See *id.* at 223-24.

123. Mackey v. Nat'l Football League, 543 F.2d 606, 614 (1976).

124. See *id.*

125. See *id.*

126. See Stiglitz, *supra* note 108, at 173.

127. See Chris Tomasson, *Veteran Players Believe NBA Lockout More Likely Than Not*, FANHOUSE.COM, Feb. 10, 2010, <http://nba.fanhouse.com/2010/02/10/veteran-players-believe-nba-lockout-more-likely-than-not/>.

ries, and shorten the length of players' contracts.¹²⁸ The league's first proposal to the NBPA addressed these concerns. In the proposal, the league proposed reducing the amount of revenue dedicated to players' salaries—currently at fifty-seven percent of BRI—to forty percent of BRI.¹²⁹ The proposed change would reduce the amount of money teams would have to spend on players' salaries by approximately \$4.6 million per year.¹³⁰ With the significant losses sustained by teams recently, this proposed reform seeks to not only lower costs for teams, but to provide more funds to the teams through this reallocation of revenue from player salaries to other expenses.

The league also proposed reducing the maximum salary guarantees for veterans and rookies by nearly a third of what players are eligible for under the current CBA.¹³¹ Under the current CBA, the length of the maximum veteran contract is six years if a team is re-signing its own player and five years if it is signing a free agent.¹³² The starting salary under such a contract equals the maximum allowable under the NBA salary cap: twenty-five percent of the existing salary cap for players with less than seven years experience and thirty percent of the existing salary cap for players with seven or more years of experience.¹³³ The player then enjoys 10.5% pay increases for each of the subsequent five years on the contract.¹³⁴ In recent years, some maximum veteran contracts have totaled more than \$100 million.¹³⁵ Under the league's proposal, the maximum veteran contract would be worth less than \$60 million—significantly less than what players currently

128. See Mitch Lawrence, *NBA Seeks New Pact*, N.Y. DAILY NEWS, Apr. 14, 2009, available at 2009 WLNR 6958809.

129. See Frank Hughes, *Players, Owners Already at Odds*, SI.COM, Feb. 13, 2010, http://sports.illustrated.cnn.com/2010/writers/frank_hughes/02/12/labor.talks/index.html?eref=sihp. Under the current NBA CBA, the teams get forty-three percent of BRI; in the league's proposal, teams would receive sixty percent of BRI. *Id.* Some believe that the allocation of the BRI may wind up falling somewhere in between—perhaps a fifty-fifty split of BRI between the teams and players' salaries. See Steve Kyler, *The Things to Know About the Next CBA*, HOOPSWORLD.COM, Jan. 28, 2010, http://www.hoopsworld.com/Story.asp?story_id=15114.

130. See Kyler, *supra* note 129.

131. See *Union: NBA Tears Up Proposal After Meeting*, NBCSPORTS.COM, Feb. 12, 2010, <http://nbcports.msnbc.com/id/35374515/ns/sports-nba/>.

132. See NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 42, at art. XI, § 4.

133. See Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS LAW J. 21, 50 (2008). See also NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 42, at art. II, § (7)(a)(2).

134. See Goldberg, *supra* note 133, at 50.

135. See, e.g., *Report: Arenas Agrees to Six-Year, \$111 Million Contract to Help Wizards' Future*, ESPN.COM, July 7, 2008, <http://sports.espn.go.com/nba/news/story?id=3473164> (noting that Gilbert Arenas' six-year, \$111 million contract was approximately \$16 million less than the allowable contract that the Washington Wizards could offer him).

enjoy.¹³⁶ This proposed reduction is due to a decrease in both the yearly salary of the contract and in the length of the contract. The league's proposal contemplates a maximum of four years for a veteran player re-signing with their existing team and a maximum of three years for players signing with a different team.¹³⁷ This is in stark contrast to the existing six-year and five-year maximum lengths of veterans' contracts. In these regards, players face significant reductions in the length and pay of their maximum veteran contracts. Moreover, under the league's proposal, only half of a player's contract would be guaranteed—also a major shift from the fully guaranteed contracts the players currently enjoy.¹³⁸

The salary cap also appears to be of great concern to the league. In their proposal, the league suggested implementing a “hard” salary cap—where a team's total player salary cannot exceed the salary cap for any reason.¹³⁹ This proposed hard salary cap would eliminate the “Larry Bird” exception—which allows teams to exceed the salary cap to resign its own players—and other exceptions, such as the mid-level exception, that currently allow teams to sign players to contracts above the soft salary cap threshold.¹⁴⁰ From the teams' perspective, a hard salary cap ensures a ceiling for payroll costs—thus minimizing the chances for the type of financial difficulties that many teams are currently facing. Finally, the league seeks to retroactively modify existing long-term contracts to comport with its proposed structure.¹⁴¹ While unlikely to occur, this aspect of the proposal would ensure a smooth transition if indeed the NBA adopts a hard salary cap.¹⁴²

136. See *Report: NBA Proposal Targets Players' Salary Cuts*, NBA.COM, Feb. 11, 2010, <http://www.nba.com/2010/news/02/11/CBA.proposal.ap/index.html> (noting that the less than \$60 million figure would be less than half of what Cleveland Cavaliers forward LeBron James could earn if he opts out of his contract and resigns with the Cavaliers for the maximum veteran contract during the summer of 2010).

137. See Hughes, *supra* note 129.

138. See Chris Sheridan, *Foyle Says Owner Proposal Goes Too Far*, ESPN.COM, Feb. 7, 2010, <http://sports.espn.go.com/nba/news/story?id=4895310>.

139. See Hughes, *supra* note 129 (detailing the league's proposal). See also Benjamin A. Tulis, *Final-Offer “Baseball” Arbitration: Contexts, Mechanics & Applications*, SETON HALL J. SPORTS & ENT. L. 85, 94 n.33 (2010) (defining a “hard” salary cap).

140. See Hughes, *supra* note 129. See also Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1488 n.157 (2006) (detailing the Larry Bird exception).

141. See Hughes, *supra* note 129.

142. See Sheridan, *supra* note 138 (detailing transition issues from a soft salary cap to a hard salary cap). The NBPA is unlikely to approve the retroactivity facet of the proposal because it has already signaled that it will not seriously renegotiate the NBA CBA until after the summer of 2010 when many of the league's star players are poised to sign lucrative new contracts as free agents. See Hughes, *supra* note 129.

The NBPA has called the league's proposal "oppressive"¹⁴³ and "rash" and "unfair."¹⁴⁴ The players' union has also made it clear to the league that it would not accept a hard salary cap as a starting point for negotiations.¹⁴⁵ In this regard, the NBPA has made it clear to the league that it will negotiate vigorously on these monetary and contractual issues. Moreover, the players' union may seek a change of its own: the way that NBA teams share revenue. Many players believe—perhaps unsurprisingly—that the root of the NBA's financial problems stems not from the length and amount of players' contracts, but rather from the perceived inequitable manner in which revenue is shared between larger market and smaller market teams.¹⁴⁶ Consequently, the NBPA may push for reforms in revenue sharing between the teams to close the gap between the "haves" and the "have-nots"—a gap that has been seemingly exacerbated, as discussed above, by the current economic downturn.¹⁴⁷ Indeed, the players' union may not be willing to concede any portion of their existing share of BRI unless the owners agree to amend their current revenue sharing arrangement.¹⁴⁸ Given that the NBPA and the league seem so far apart on these critical subjects of negotiation for the CBA, it is hard to predict on which issues each side may be willing to compromise.

V. CONCLUSION

The upcoming renegotiation of the CBA may well find some terms upon which the NBPA and the league can reach agreement more easily. For example, both sides have demonstrated a willingness to discuss a possible reduction in the regular season schedule—currently eighty-two games long—to help prevent injuries to players and to keep fans engaged and interested throughout the regular season.¹⁴⁹ In addition, there may be a number of non-monetary matters on which the two sides will negotiate. For example, NBA Commissioner David Stern has long sought to raise the minimum age requirement for the league from its current age of nineteen to twenty years.¹⁵⁰ The league

143. See *Union: NBA Tears Up Proposal After Meeting*, *supra* note 131 (quoting NBPA Executive Director Billy Hunter as saying the NBPA was seeking "an agreement that's a lot more equitable and that doesn't have a structure that's oppressive").

144. See Sheridan, *supra* note 138 (quoting NBPA Vice President Adonal Foyle).

145. See *id.*

146. See Kyler, *supra* note 129.

147. See *id.*

148. See *id.*

149. See Berger, *supra* note 9.

150. See Jordan Michael Rossen, *The NBA's Age Minimum and Its Effect on High School Phenoms*, 8 VA. SPORTS & ENT. L.J. 173, 174-76 (2008) (detailing the NBA's concerns with high school players going straight to the NBA at the age of seventeen or eighteen).

may choose to revisit this issue during the upcoming renegotiation.¹⁵¹ The NBPA, which has opposed increasing the minimum age, may be more open to this issue as a bargaining chip for other more pressing matters—such as monetary or contractual gains—or because raising the age requirement would allow more veterans opportunities to sign contracts as it would further delay competition from younger players.¹⁵²

However, the likelihood is that the renegotiation will be contentious as both sides seem strident in their economic positions. Perhaps the recent salary cap and luxury tax threshold projections for the 2010-11 season—constituting a smaller drop in revenue than the league anticipated—may provide both sides with some room for compromise on their polar economic positions. Yet the owners seem content with—perhaps even eager for—a lockout of the players for the 2010-11 season. This may be attributed, in part, to the fact that the NBA's television contracts with ABC and Turner Sports will pay \$900 million for the season—approximately \$30 million per team—regardless of whether the NBA plays any games or not.¹⁵³ With no player payroll, many owners—if not all—may make money on the television revenues alone.¹⁵⁴ The owners may also feel resolute in locking out the players because of the significant losses the league and many individual teams have experienced in recent years. At the same time, team owners must be mindful of the potential long-term negative impact that a sustained lockout could inflict on the league.¹⁵⁵ With the team owners' focus on reducing costs (likely through player contracts and salaries), the NBPA may face similar circumstances as those in the 1960s and 1970s when its near entire focus in CBA negotiations was

151. However, there is a possibility that the league will not press this minimum age matter in the renegotiation because international competition has seemingly thwarted the purpose for the minimum age requirement—that is forcing high school students to attend college. See Matthew Epps, *Full Court Press: How Collective Bargaining Weakened the NBA's Competitive Edge in Globalized Sport*, 16 VILL. SPORTS & ENT. L.J. 343, 345-46 (2009). Instead, the minimum age requirement has encouraged high school students to play basketball in Europe until they are eligible to enter the NBA. See *id.* This reality, coupled with the importance of the economic gains that the league seeks, may lead Commissioner Stern and his team of negotiators to abandon the raising of the minimum age requirement as a subject for the upcoming renegotiation.

152. See Kyler, *supra* note 129.

153. See Hughes, *supra* note 129.

154. See *id.*

155. See, generally, Martin B. Schmidt & David J. Berri, *The Impact of Labor Strikes on Consumer Demand: An Application to Professional Sports*, 94 AM. ECON. REV. 344 (2004). See also Christopher J. McKinny, Comment, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 254 (2003) (noting the near devastating effects that the work stoppage in 1994 had on MLB).

on providing economic gains for its players.¹⁵⁶ Yet the NBPA must also be mindful of the economic challenges facing the league and its owners in advocating for employment terms acceptable to their members. Indeed, the long-term stability of the league may depend on the ability of both sides to reach agreement and maintain labor peace.

To be sure, the economics of the NBA have changed and the primary focus of the upcoming renegotiation of the CBA will focus on the key terms—allocation of BRI, salary cap, luxury tax, players' contracts, teams' revenue sharing, etc.—in attempting to solve the financial issues plaguing the league while maintaining peace between the NBPA and the league. How the renegotiation will be resolved remains to be seen. However, one thing is clear: The Great Recession has had a significant and potentially long-term impact on the NBA.

156. See Robert I. Lockwood, Note, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Forefront in the NBA*, 15 SPORTS LAW. J. 137, 149-50 (2008).